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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 LARRY J. HASKELL and KATHRYN A. }
9 HASKELL, }
10 Plaintiffs, }
11 v. }
12 PNC BANK, N.A., et al, }
13 Defendants. }
14 _____)

3:11-cv-887-RCJ-VPC

ORDER

15 Currently before the Court is a Motion to Dismiss Plaintiff's Remaining Claims (ECF
16 No. 18) by Defendants' PNC Bank, N.A. and Federal National Mortgage Association, Inc.
17 ("Fannie Mae") (collectively "Defendants"). For the following reasons, the Motion to
18 Dismiss (ECF No. 18) is granted.

19 **BACKGROUND¹**

20 Plaintiffs Larry and Kathryn Haskell (collectively "Plaintiffs") are the owners of real
21 property located at 3170 Zaragoza Drive, Sparks, Nevada (the "Property"). (Compl. ¶ 2,
22 ECF No. 1-1). On September 17, 2003 Plaintiffs executed a deed of trust (the "Deed of
23 Trust") against the Property to secure a \$197,600 loan. (Deed of Trust ¶¶ 1-2, ECF No. 9-
24 3). The Deed of Trust listed National City Mortgage Company ("National City") as lender
25 and Stewart Title Company as trustee. (*Id.*). National City later merged into PNC Bank,
26 which thereby acquired the rights to the Deed of Trust by operation of law. (Mot. to Dismiss
27 ¶ 6, ECF No. 9). On June 22, 2011, Cal-Western Reconveyance Corporation ("Cal-
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1 Western"), claiming to be the attorney-in-fact of PNC Bank, substituted itself as trustee of
 2 the Deed of Trust. (Substitution of Trustee ¶ 5, ECF No. 9-4). Prior to this motion, no
 3 evidence that Cal-Western was given authority to act as attorney-in-fact for PNC Bank had
 4 been submitted to this Court.

5 At some point, Plaintiffs defaulted on the loan secured by the Deed of Trust and on
 6 June 27, 2011 Cal-Western recorded a notice of default. (Notice of Default ¶ 6, ECF No. 9-
 7 4). A certificate was later issued by the State of Nevada Foreclosure Mediation Program
 8 allowing the foreclosure process to proceed, which was recorded on October 14, 2011.
 9 (Certificate ¶ 8, ECF No. 9-4). On October 14, 2011, Cal-Western recorded a notice of
 10 trustee's sale. (Notice of Trustee's Sale ¶ 9, ECF No. 9-4).

11 On November 10, 2011, Plaintiffs filed their complaint in the Second Judicial District
 12 Court of the State of Nevada against PNC Bank, Fannie Mae, and Cal-Western. (Compl.
 13 ¶1, ECF No. 1-1). Fannie Mae is included in this action because allegedly PNC Bank
 14 indicated that Fannie Mae is the current owner of the promissory note and that Fannie Mae
 15 confirmed this, but it is unclear if Fannie Mae ever obtained ownership of the note and
 16 when this transfer may have taken place. (*Id.* at 4).

17 The dispute was later removed to federal court on December 12, 2011. (Pet. for
 18 Removal, ECF No. 1). Defendants filed a motion to dismiss the Complaint for failure to
 19 state a claim pursuant to Rule 12(b)(6) on February 17, 2012. (Mot. to Dismiss, ECF No.
 20 9). This Court heard oral arguments on May 7, 2012, and thereafter granted in part and
 21 denied in part the Defendants' Motion to Dismiss (ECF No. 9). (Order, ECF No. 20). The
 22 Court held Defendants were not entitled to summary judgment on the claim that they
 23 violated NRS § 107.080 because it was not clear whether Cal-Western had been properly
 24 substituted as trustee of the Deed of Trust. (*Id.*) Cal-Western substituted itself as trustee
 25 of the Deed of Trust on June 22, 2011. (Substitution of Trustee ¶ 5, ECF No. 9-4). Cal-
 26 Western claimed it was acting as attorney-in-fact for PNC Bank, but Defendants failed to
 27 present any evidence that Cal-Western had authority to act on behalf of PNC Bank in
 28 executing the Substitution of Trustee. A genuine issue of material fact therefore existed as

1 to whether Cal-Western had authority to execute the Substitution of Trustee. Accordingly,
 2 Defendants were not entitled to summary judgment on Plaintiffs' claim for violation of NRS
 3 § 107.080 or the dependent injunctive and declaratory relief claims based on the same
 4 claim. (Order ¶ 5, ECF No. 20).

5 The sole remaining issue is whether the trustee under the Deed of Trust was
 6 properly substituted (Cal-Western Reconveyance Corporation for Stewart Title Company).
 7 Cal-Western's filing stated that it had authority, but there was nothing in the record
 8 indicating that PNC Bank authorized the substitution. Defendants now file this Motion to
 9 Dismiss the Remaining Claims. (Mot. to D., ECF No. 18). Included in Defendants'
 10 memorandum is a declaration from a mortgage officer of PNC Bank stating the substitution
 11 of trustee was authorized. (*Id.* at No. 18-1).

12 **LEGAL STANDARD**

13 The purpose of a Rule 12(b)(6) motion to dismiss is to test the legal sufficiency of a
 14 complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “[T]he issue is not
 15 whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer
 16 evidence to support the claims.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.
 17 1997) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

18 To avoid a Rule 12(b)(6) dismissal, a complaint must plead “enough facts to state a
 19 claim to relief that is plausible on its face.” *Clemens v. DaimlerChrysler Corp.*, 534 F.3d
 20 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
 21 A claim is plausible on its face “when the plaintiff pleads factual content that allows the
 22 court to draw the reasonable inference that the defendant is liable for the misconduct
 23 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although detailed factual allegations
 24 are not required, the factual allegations “must be enough to raise a right to relief above the
 25 speculative level.” *Twombly*, 550 U.S. at 555. All well-pleaded factual allegations will be
 26 accepted as true and all reasonable inferences that may be drawn from the allegations
 27 must be construed in the light most favorable to the nonmoving party. *Broam v. Bogan*,
 28 320 F.3d 1023, 1028 (9th Cir. 2003).

1 If the court grants a motion to dismiss a complaint, it must then decide whether to
 2 grant leave to amend. The court should freely give leave to amend when there is no
 3 “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to
 4 the opposing party by virtue of allowance of the amendment, [or] futility of amendment.”
 5 *Foman v. Davis*, 371 U.S. 178, 182 (1962); see also FED. R. CIV. P. 15(a). Generally, leave
 6 to amend is only denied when it is clear that the deficiencies of the complaint cannot be
 7 cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
 8 1992).

9 **DISCUSSION**

10 **I. Injunctive and Declaratory Relief Based on Violations of NRS § 107.080**

11 NRS § 107.080 provides certain procedures that must be followed before a trustee
 12 may execute the power of sale. See NRS § 107.080(5)(a). Without substantial compliance
 13 with these procedures, the sale may be declared void. *Id.* In order to foreclose on the
 14 borrower, the beneficiary, the successor in interest of the beneficiary, or the trustee must
 15 first execute and cause to be recorded a notice of default. NRS § 107.080(2)(c). It is
 16 statutorily defective when an entity who is not yet the beneficiary, trustee, or an agent of
 17 one of these entities records the notice of default. *Chandler v. Indymac Bank, F.S.B.*, 2011
 18 WL 1792772, at 2 (D. Nev. 2011). Here, the Court found no facts evidencing PNC Bank
 19 had authorized Cal-Western to substitute as trustee for Stewart Title. (Order ¶ 5, ECF No.
 20 20). At the May 7, 2012 hearing, Defendants specifically inquired of the Court whether a
 21 declaration from PNC Bank stating Cal-Western was authorized to act as their agent would
 22 be satisfactory evidence regarding the substitution of trustee. (Mot. Hr’g at 10:31–10:36am,
 23 May 7, 2012, Ctrm. 6). The Court acknowledged such a declaration would be sufficient.
 24 (*Id.*). Defendants now submit to the Court with this declaration from an officer of PNC
 25 Bank stating the substitution of Cal-Western as trustees was authorized. (Motion ¶ 10, ECF
 26 No. 18-1). Defendants have now provided enough undisputed facts to challenge Plaintiffs’
 27 claims and dismissal for failure to state a claim is proper.

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1 “If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are
2 presented to and not excluded by the court, the motion must be treated as one for
3 summary judgment under Rule 56.” FED. R. CIV. P. 12(d). A court must grant summary
4 judgment when “the movant shows that there is no genuine dispute as to any material fact
5 and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). The
6 moving party bears the initial burden of showing the absence of a genuine issue of material
7 fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its
8 initial burden, the burden will then shift to the opposing party to establish that a genuine
9 issue of material fact exists. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
10 U.S. 574, 586 (1986). The opposition must go beyond the allegations and assertions of
11 the pleadings and set forth specific fact by providing the court with competent evidence
12 that establishes a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex Corp.*, 477 U.S. at
13 324. If the moving party fails to satisfy its initial burden, the court must deny the motion for
14 summary judgment and need not consider the nonmoving party’s evidence. See *Adickes*
15 *v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970).

16 Defendants have provided the Court with a declaration from an officer of PNC Bank
17 stating Cal-Western was authorized to act as trustees. (Motion ¶ 10, ECF No. 18-1).
18 Plaintiffs have failed to show any facts disputing the declaration. Defendants are therefore
19 entitled to summary judgment on the claim that the foreclosure process failed to comply
20 with NRS § 107.080.

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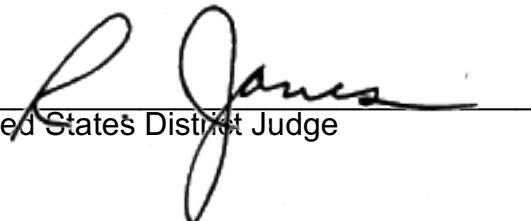
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1 **CONCLUSION**

2 For the foregoing reasons, IT IS ORDERED that the Court grants Defendants'
3 motion to dismiss remaining claims.

4 IT IS FURTHER ORDERED that Defendants' motion to dismiss Plaintiffs first claim
5 for injunctive and declaratory relief based on violations of NRS § 107.080 is converted into
6 a motion for summary judgment and that Defendants are awarded summary judgment on
7 Plaintiffs' claim for violations of NRS § 107.080

8 DATED: This 26th day of November, 2012.

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11 United States District Judge
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